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Regulatory
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Final Regulation Agency Background Document

Approving authority name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC 25-260
Regulation title	Water Quality Standards
Action title	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating Lake Drummond and portions of Brown Mountain Creek, Laurel Fork, North Fork of the Buffalo River, Pedlar River, Ramseys Draft, and Whitetop Laurel Creek as Exceptional State Waters
Document preparation date	December 7, 2004

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The proposed amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation designates seven surface waters for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The State Water Control Board adopted at their December 2, 2004 meeting an amendment to the Water Quality Standards regulation to designate seven surface waters as Exceptional State Waters.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

If the final text differs from the text at the proposed stage, please indicate whether the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site

<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site

<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This proposed regulatory action is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designations met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” section.

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State’s Water Quality Standards regulation, designates Lake Drummond and portions of Brown Mountain Creek, Laurel Fork, North Fork of the Buffalo River, Pedlar River, Ramseys Draft, and Whitetop Laurel Creek for special protection as Exceptional State Waters (9 VAC 25-260-30.A.3.c).

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in

the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The seven waters under consideration for designation do not currently contain any permitted point source discharges.

The primary advantage to the public is that the waters will be protected at their present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). Although all of these waters proposed for designation are located on public (federal) land, those localities and businesses located near the designated waters may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that lead to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
9 VAC 25-260-30		NA	

Public comment

Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

All Seven Waters:

Commenter	Comment
Katherine E. Slaughter,	Wrote on behalf of the Southern Environmental Law Center in support of all proposed designations. She stated that all meet the eligibility criteria and all are located in areas

Senior Attorney, SELC	used by either boaters, hunters, anglers, or wildlife observers and therefore are important to tourism, one of Virginia's most important industries.
Jeff Smith	Wrote to strongly support all proposed designations.
Bill Tanger, FORVA	Mr. Tanger, representing Friends of the Rivers of Virginia, provided oral comment at the August 11, 2004 public hearing in support of all waters currently proposed for Tier III designation.
Betty Byrne Ware	Strongly supports all proposed designations and hopes more designations will be added in the future.
Eric E. Zicht	He states his concern that Virginia may be relinquishing some state powers when placing water bodies in this category and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".
Leo Schwartz Virginia Land Rights Coalition	He wrote on behalf of VLRC in opposition to all proposed designations because the VLRC believe the United States, and the Virginia DEQ acting as an agent of the EPA, are prohibited from designating the nominated waters as "national resources", thus imposing federal regulations and controls on private lands and waters. A number of past court cases and litigation regarding the lack of federal jurisdiction within state and local matters and territories were cited. They also believe the questions surrounding political motivation and conflict in Tier 3 nominations point to tainted interrelationships between powerful environmental lobbyists, non-governmental organizations, and state and federal bureaucracies. Mr. Schwartz stated it is very difficult to conclude these nominations have anything to do with protecting water resources, but instead have everything to do with the 'environmentalist' agenda to enrich themselves and to control people and their land. Designation of the nominated streams would create an arena for conflict between landowners and county government, and regulatory agencies and radical 'environmental' NGOs. They believe the designation would lead to a litigation 'goldmine' for radical environmental litigants, wasting and diverting scarce private and county economic resources, and polarizing local residents while enriching 'nonprofit' lawyers and the special interests they serve. They believe that private, free-market solutions should be used to allow and encourage landowners to conserve natural resources instead of coercion by fines, lawsuits and mandates of government bureaucracy.

Brown Mountain Creek, North Fork of the Buffalo River, and Pedlar River, Amherst County:

Commenter	Comment
S. Grant Massie, Director of Planning, Amherst County	Wrote on behalf of the Amherst Co. Board of Supervisors to convey their support for the proposed designations within Amherst County and that the goals of the Exceptional Waters program are consistent with the county's Comprehensive Plan. The Board would also support the inclusion of all tributaries to the proposed streams.
Bob Fener	Commented that he resides in the vicinity of the proposed water bodies within Amherst Co. and that he is in favor of the strictest possible protective measures for them.
Dan E. French, Director of Public Utilities, Amherst County	Commented on behalf of the Amherst Co. Service Authority and the Amherst Co. Planning Department in support of the nomination. He stated that Amherst County has substantial interest in preserving water quality within the county and that all Tier III nominations in Amherst County are very compatible with county watershed initiatives and ordinances. The county also offered other tributaries to the Buffalo

	River to be included in the Exceptional State Waters Program. He also stated that, as a private citizen, he supports the nominations.
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Laurel Fork, Highland County:

Commenter	Comment
Roberta A. Lambert, Highland County Administrator	Wrote on behalf of the Highland County Board of Supervisors to convey their unanimous opposition to the nomination on the grounds of their perceptions of potential impacts to private landowners upstream of the proposed designation. They have concerns of potential restrictions that would not allow landowners to raise money from their land through logging operations.
Dan Bieker	Wrote in support of the nomination and stated that the preservation of the stream and its watershed is in the best interest of Virginia's citizens.
Michael A. Dymersky	Wrote in support of the nomination and stated that Laurel Fork meets all criteria necessary for Tier III designation and the stream and its watershed represents one of the wildest and best preserved wilderness areas and is deserving of Tier III status.
David Kiser	Wrote on behalf of the Laurel Fork League in opposition to the nomination.
Betty C. Kiser	Wrote in opposition to the nomination.
Judi McCoy, President, Friends of the Cowpasture River	Wrote on behalf of the Friends of the Cowpasture River Board of Directors in opposition to the nomination. Their mission statement opposes Tier III designation for any waterbody in the Commonwealth of Virginia.
Lucile S. Miller	Wrote in support of the nomination and stated the stream and its watershed provide much needed habitat for several federally endangered or threatened species.
Clifton A. Rexrode	Opposes the nomination citing restriction of private land use and a reduction of property values as reasons for his opposition. He also stated that the US Forest Service, the sole landowner whose property abuts the nominated section, has been an excellent steward of Laurel Fork and a Tier III designation will not change current or future USFS management practices in regard to the stream.
Melanie Simmons	Wrote in opposition to the nomination
Scot Simmons	Wrote in opposition to the nomination.

Agency response

Issue: Regarding concerns of the potential of the designation to restrict a private landowner's use of his land and/or raise money from his land through logging.

Response: The section of Laurel Fork under consideration for designation as an Exceptional State Water is entirely contained within the George Washington National Forest and has no private property adjacent to it. Federal regulation does not mandate that states establish control of non-point sources in federal Outstanding National Resource Waters or their equivalent Exceptional State Waters. EPA has stated that the Clean Water Act does not provide direct regulatory authority over nonpoint sources and that nonpoint source control would rely on a voluntary program to achieve the Tier 3 standards. Therefore, EPA does not require a State to establish Best Management Practices (BMPs) for nonpoint sources where such BMP requirements do not exist. As with any activity that might impact the quality of a water body, all those able to use cost-effective and reasonable best management practices as nonpoint

source control measures are urged to do so. However, the implementation of Exceptional State Water requirements will not impose additional best management practices on any previously non-regulated activity. For example, federal antidegradation regulations do not impact forest management activities such as timber sales, prescribed burning, road management, developed and dispersed recreation and mechanical dosing systems or other types of limestone mitigation of acidified streams.

- **Issue:** Why is an additional layer of governmental protection necessary when a water body is already within the boundaries and under the protection of the US Forest Service?

Response: The Department's Exceptional State Waters guidance on eligibility decision criteria for exceptional environmental settings includes as one of the eligible factors that "the water represents an important component of a state or national park, forest, or wildlife refuge." Therefore, the six waters - including Laurel Fork - identified within US national forest land in Virginia for consideration for designation are consistent with the Department's criteria of what constitutes an Exceptional State Water. In addition, the regulatory prohibition on new or increased point source discharges to Exceptional State Waters is an added layer of protection to the water body over that provided by the Forest Service.

- **Issue:** Highland County opposes the designation of Laurel Fork as an Exceptional State Water.

Response: Comment from localities in which the water body lies is one of the factors that the Board considers when deciding whether or not to designate a water as an Exceptional State Water.

Ramseys Draft, Augusta County:

Commenter	Comment
Walter L. Williams	Stated his continued support for any action that protects Laurel Fork and Ramseys Draft from degradation.

Whitetop Laurel Creek, Washington County:

Commenter	Comment
	No comments received other than those found under the "all seven waters" summary.

Lake Drummond, Cities of Chesapeake and Suffolk:

Commenter	Comment
Sharon Hart	Spoke at the August 16, 2004 public hearing in support of the Ragged Island Creek and <u>Lake Drummond</u> nominations.
Mike Lane	Spoke at the August 16, 2004 public hearing and stated his support for the Ragged Island Creek and <u>Lake Drummond</u> Tier III nominations.

Agency response

The agency response to the public comments is that staff have determined that these seven waters proposed for designation meet the required eligibility criteria necessary for consideration as Exceptional State Waters and, to the best determination of agency staff, are wholly located on publicly owned land.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes.

Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designation under 9 VAC 25-260-30.A.3.c as an Exceptional State Water.	The addition of seven water bodies to 9 VAC 25-260-30.A.3.c. These waters meet the eligibility criteria necessary to be designated as Exceptional State Waters.

In 9 VAC 25-260-30 the following amendment was adopted by the State Water Control Board:

(3) ~~(Reserved.)~~ Lake Drummond, located on U.S. Fish and Wildlife Service property, is nominated in its entirety within the cities of Chesapeake and Suffolk excluding any ditches and/or tributaries.

(5) Brown Mountain Creek, located on U.S. Forest Service land in Amherst County, from the City of Lynchburg property boundary upstream to the first crossing with the national forest property boundary.

(6) Laurel Fork, located on U.S. Forest Service land in Highland County, from the national forest property boundary below Route 642 downstream to the Virginia/West Virginia state line.

(7) North Fork of the Buffalo River, located on U.S. Forest Service land in Amherst County, from its confluence with Rocky Branch upstream to its headwaters.

(8) Pedlar River, located on U.S. Forest Service land in Amherst County, from where the river crosses FR 39 upstream to the first crossing with the national forest property boundary.

(9) Ramseys Draft, located on U.S. Forest Service land in Augusta County, from its headwaters (which includes Right and Left Prong Ramseys Draft) downstream to the Wilderness Area boundary.

(10) Whitetop Laurel Creek, located on U.S. Forest Service land in Washington County, from the national forest boundary immediately upstream from the second railroad trestle crossing the creek above Taylors Valley upstream to the confluence of Green Cove Creek.

Impact on family

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.